

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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TRUSTEES OF LABORERS UNION LOCAL
NO. 1298 OF NASSAU AND SUFFOLK
COUNTIES BENEFIT FUNDS,

Plaintiffs,

-against-

ORDER

11 CV 1569 (DRH) (AKT)

ANNEX GENERAL CONTRACTING, INC.

Defendant.

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HURLEY, Senior District Judge:

On July 11, 2011, this Court granted plaintiffs' motion for an entry of default judgment against defendant Annex General Contracting, Inc., and referred the case to Magistrate Judge A. Kathleen Tomlinson, pursuant to 28 U.S.C. § 636(b)(3), for a report and recommendation as to damages and attorneys' fees. On March 2, 2012, Judge Tomlinson issued a Report and Recommendation recommending that "Annex General be ordered to submit to an immediate audit of its books and records" for the period between July 1, 2009 and December 31, 2009. (R&R at 5.) Judge Tomlinson further recommended that if defendant fails to submit to an audit within a time period specified by the Court, damages should be awarded to plaintiffs as follows:

(1) \$25,275.04 for unpaid benefit contributions,¹ (2) interest on the delinquent benefit

¹ Plaintiffs estimated the amount of unpaid contributions due by using "standard laborer's hours of 160 hours for a 4 week month and 200 hours for a 5 week month." (R&R at 6 (internal quotation marks omitted).) The applicable Policy for Collection of Delinquent Contributions sets forth a formula to be used in estimating the amount due if an employer fails to submit to an audit. Pursuant to that formula, unpaid contributions would be calculated using "the number of hours for the month in which the largest number of hours were reported in the previous twelve (12) reports submitted by the Employer." (*Id.* at 7 (internal quotation marks omitted).) Because defendant never provided any remittance reports, however, plaintiffs could not use this formula and were forced to estimate the amounts due by using the "standard laborer's hours" outlined above. (*Id.* at 8.) Judge Tomlinson recommended: "Since the estimation was

contributions in the amount of \$6.90 per day from April 20, 2010 until the date judgment is entered, (3) liquidated damages in the amount of \$6.90 per day from April 20, 2010 until the date judgment is entered, (4) \$2,300.00 in attorneys' fees, and (5) \$400.00 in costs.

On March 5, 2012, defendant was served with a copy of the Report and Recommendation. More than fourteen days have elapsed since service of the Report and Recommendation. No party has filed any objections.

Pursuant to 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72, this Court has reviewed the Report and Recommendation for clear error, and finding none, now concurs in both its reasoning and its result. Accordingly, the Court adopts the March 7, 2012 Report and Recommendation of Judge Tomlinson as if set forth herein.

not made in accordance with the formula set forth in the policy, [] the Court [] recommends . . . that defendant be permitted to present evidence (in a time frame determined by Judge Hurley) demonstrating that Plaintiffs' estimation is incorrect." (R&R at 8-9.) The Court hereby adopts this recommendation, even as it notes that defendant has failed to file any response to plaintiffs' original request for damages or to the Report and Recommendation. Any response by defendant on this point must be filed within twenty (20) days of the date of this Order.

The Court hereby directs defendant Annex General Contracting, Inc. to permit and cooperate in an audit of its books and records within thirty (30) days of the date of this Order. Plaintiffs are given sixty (60) days from the date of this Order to inform the Court whether defendant has complied with this Order. If the defendant fails to submit to an audit within the specified time frame, the Court will enter an Order and Judgment awarding plaintiffs damages as recommended in the March 2, 2012 Report and Recommendation.

Counsel for plaintiffs is hereby directed to serve a copy of this Order upon defendant Annex General Contracting, Inc. and file proof of service on ECF.

SO ORDERED.

Dated: Central Islip, New York
March 21, 2012

/s/
Denis R. Hurley
United States District Judge